

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

6/27
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P/S
75-1183

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

vs.

SUEY WING NG, also known as "Ah Sue,"

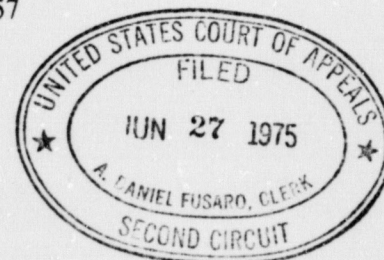
Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

**PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC AND, IN THE ALTERNATIVE,
MOTION TO RECALL MANDATE AND UPON SUCH
RECALL TO STAY MANDATE PENDING CERTIORARI**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
Docket No. 75-1183
-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SUEY WING NG, also known as
"Ah Sue",

Defendant-Appellant.

-----x
PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
AND, IN THE ALTERNATIVE, MOTION
TO RECALL MANDATE AND UPON
SUCH RECALL TO STAY MANDATE
PENDING CERTIORARI

TO THE HONORABLE JUDGES GIVENS, GURFEIN AND MESKILL:

The Petitioner, SUEY WING NG, respectfully petitions this Court for a rehearing in connection with its decision of June 17, 1975, affirming the judgment of the United States District Court for the Southern District of New York, which had convicted Petitioner of the crime of conspiracy after trial before Weinfeld, D.J., and a jury.

The conspiracy was to violate the narcotics laws (21 U.S.C. §§812(a)(1) and 841(b)(1)(A)).

The jury hung on counts 2 through 7 which were the substantive counts of possession and sale.

BACKGROUND OF THE CASE

The defendant-appellant herein was convicted of only a conspiracy charge and there was a hung jury with respect to six substantive counts.

As of this writing petitioner has not yet been incarcerated and we are asking that this Court grant a stay of incarceration pending determination of this petition for rehearing as well as pending the filing and determination of a writ of certiorari in the event this Court does not grant a rehearing or, upon a rehearing, adheres to its original determination.

REASONS FOR GRANTING REHEARING

One of the issues upon which we feel this Court should grant a rehearing and, indeed, should consider the matter en banc if necessary, is the fact that NG was not found guilty upon any substantive charges. We respectfully submit that this brings up for consideration the so-called "Wharton Rule" which, in its simplest form, states:

"When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."*

*2 Wharton, Criminal Law, §1604, at 1862 (12th Ed. 1932).

Wharton's Rule was adopted by this Court in the landmark case of UNITED STATES v. ZEULI, 137 F.2d 845, (2d Cir. 1943), where Judge Learned Hand wrote:

"If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it."*

The Supreme Court approved this rule of law in GEBARDI v. UNITED STATES, 287 U.S. 112, 122 (1932), where it held:

". . .where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statutes."**

See also, UNITED STATES v. ZANE, 507 F.2d 346 (2d Cir. 1974).

We also ask this Court to consider the fact that in its recent decision in IANNELLI v. UNITED STATES, __U.S.__, 17 Cr.L. 3127, (decided 3/25/75), the Supreme Court of the United States reaffirmed the viability of the Wharton Rule, but held that

*See UNITED STATES v. CENTRAL VEAL & BEEF COMPANY, 162 F.2d 766 (2d Cir. 1947); UNITED STATES v. DI RI, 159 F.2d 818 (2d Cir. 1947); UNITED STATES v. BAYER, 156 F.2d 964 (2d Cir. 1946); UNITED STATES v. SAGER, 49 F.2d 725 (2d Cir. 1931); UNITED STATES v. HAGAN, 27 F.Supp. 814 (W.D.Cir. 1931); UNITED STATES v. NEW YORK CENTRAL & H.R.R. COMPANY, 146 F. 298 (Cir. Ct., S.D.N.Y., 1906).

**See UNITED STATES v. KATZ, 271 U.S. 354 (1926); UNITED STATES v. HOLTE, 236 U.S. 140 (1915).

because of a specific Congressional intent, it did not apply to the particular organized criminal activity specified in the IANNELLI case.

In the case at bar, however, we submit that Wharton's Rule should apply and we ask that this Court accept this petition for rehearing so as to clarify the viability of that Rule in cases other than the IANNELLI situation.

We suggest that in view of the fact that the jury "hung" on six substantive counts, that the imposition of sentence on the conspiracy charge should have been withheld altogether until there had been a trial or retrial on the substantive counts, since we maintain that an acquittal on those would preclude sentence or conviction upon the conspiracy.

In UNITED STATES v. McCLELLAND, UCMJ. 11/13/74, 16 Cr.L. 2287, the Court of Military Justice gives further vitality to Wharton's rule, barring a drug conspirator's conviction. There that Court cites this Court's opinions in VANNATA v. UNITED STATES, 289 Fed. 424 (C.A.2 1923) and UNITED STATES v. ZEULI, 137 F.2d 845 (2 Cir. 1943).

It should be noted that in UNITED STATES v. McCLELLAND, supra, the Court of Military Appeals just recently reaffirmed the viability of Wharton's Rule and actually barred the conviction of

a drug conspirator on that basis.

It is interesting to note that two of the decisions of this Court were cited as a basis for that Court's action.

We also ask for a rehearing en banc on the other points raised in the main brief in the event this Panel does not see fit to reassess its position on those other points.

MOTION IN THE ALTERNATIVE
FOR STAY OF MANDATE

In the event this Court determines that it will not grant a rehearing or, upon granting a rehearing adheres to its original position, then we respectfully ask that the mandate be recalled and stayed pending determination of a petition for certiorari.

Respectfully submitted,

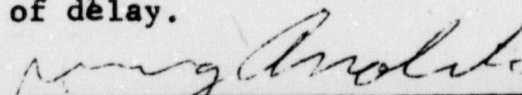
ROBERT KESHNER
Attorney for Defendant-Appellant
1930 Grand Concourse
Bronx, New York 10457
878-1360

IRVING ANOLIK and
ROBERT KESHNER,
Of Counsel.

CERTIFICATION OF GOOD FAITH

IRVING ANOLIK, an attorney at law duly admitted to practice in this Court, states that this petition for rehearing is submitted in good faith and not for the purpose of delay.

June 26, 1975


IRVING ANOLIK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

SUEY WING NG, etc.,

Defendant-Appellant.

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Affidavit of Personal Service

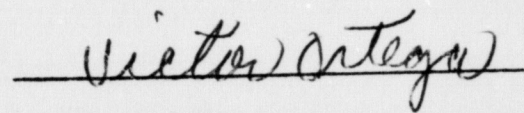
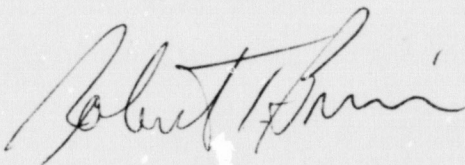
STATE OF NEW YORK, COUNTY OF New york ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 27th day of June 1975 at 1 St. Andrews Place, N.Y., N.Y.

deponent served the annexed Petition upon
Paul Curran

the Attorney in this action by delivering ² a true copy ^{es} thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 27th
day of June 19 75


VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977